(1)

Supreme Court, U.S.
FILED

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No. _____

IN THE
Supreme Court of the United States

TERESA BALLARD, ET AL.,
Petitioners,

v.

PHYLLIS GARRETT AND ADVANCE AMERICA,
CASH ADVANCE CENTERS OF ARKANSAS, INC.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARKANSAS

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether class member objectors who were denied intervention may appeal an order requiring them to post a supersedeas bond.

PARTIES TO THE PROCEEDING

Petitioners

Petitioners are Teresa Ballard, Kenisha Bryant, and Cheryl King, individual citizens of the United States. Ms. Ballard and Ms. King reside in the State of Arkansas and Ms. Bryant resided there at the time this litigation commenced. The Petitioners have no corporate affiliations. The Petitioners were objecting class members in the Circuit Court of Clark County, Arkansas and the Appellants before the Arkansas Supreme Court.

Respondents

Phyllis Garrett is an individual citizen of the United States, residing in the State of Arkansas. Ms. Garrett was the designated class representative in the Circuit Court of Clark County, Arkansas and an Appellee before the Arkansas Supreme Court.

Advance America, Cash Advance Centers of Arkansas, Inc. ("Advance America") is an Arkansas corporation. Advance America was the defendant in the Circuit Court of Clark County, Arkansas and an Appellee before the Arkansas Supreme Court.

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Petitioners respectfully petition for a Writ of Certiorari to review the judgment of the Arkansas Supreme Court in this case.

OPINIONS BELOW

The original opinion of the Arkansas Supreme Court (App. A at 1a) is reported at 348 Ark. 567, 74 S.W.3d 608. The opinion of the Arkansas Supreme Court denying the Petitioners' Petition for Rehearing (App. D at 15a) is not reported. The opinion denying the Petitioners' Motion to Amend Petition for Rehearing (App. E at 17a) was reported at 349 Ark. 726, 80 S.W. 3d 374. The opinion of the Arkansas Supreme Court upon which it relied in denying the Petitioners' Motion to Amend Petition for Rehearing (App. C at 10a) is reported at 349 Ark. 545, 79 S.W. 3d 608. The opinion of the Circuit Court of Clark County, Arkansas ordering the Petitioners to post a supersedeas bond in the amount of $ 750,000.00 (App. B at 8a) is not reported.

STATEMENT OF JURISDICTION

The judgment of the Arkansas Supreme Court was entered May 9, 2002. The Arkansas Supreme Court entered its order denying the Petitioners' timely Petition for Rehearing *per curiam* on June 13, 2002.

The jurisdiction of this court is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the following statutory provisions:

1. U. S. Const., Amend. XIV. (App. F at 18a.)

2. A.C.A. § 16-11-302. (App. F at 20a.)

3. A.C.A. § 16-65-119. (App. F at 22a.)

4. Ark. R. App. P.-Civil 2. (App. F at 22a.)

STATEMENT OF THE CASE

This appeal arises from an order of the Circuit Court for Clark County, Arkansas, the Hon. John A. Thomas, ordering the Petitioners to post a $ 750,000.00 supersedeas bond pending their appeal of his approval, over their objection, of a proposed class action settlement agreement. (App. B at 8a.)

The case began on October 12, 1999 as a suit by Ms. Garrett against Advance America, Cash Advance Centers of Arkansas, Inc. ("Advance America"). The case was certified as a class action, simultaneous notice of certification and settlement was given, and the Petitioners sought to intervene, which was denied. The Petitioners timely objected to the proposed settlement agreement as being inadequate, unreasonable, and unjust. Over the Petitioners' objection, the trial court approved the class action settlement agreement. The Petitioners appealed the trial court orders denying intervention and approving the settlement agreement.

Ms. Garrett then sought to require the Petitioners to post a supersedeas bond and to give notice of the appeal to the Class Members. The Petitioners did not request a stay of the trial court's order approving the class action settlement agreement pending their appeal. The stay was desired by the Advance America and Ms. Garrett has taken no action to secure the performance of Advance America under the settlement agreement.

After a hearing on September 5, 2001, the trial court ordered the Petitioners to post a supersedeas bond in the amount of $ 750,000.00. Due to the Petitioners' poor

financial condition, as evidenced by their previous payday loan transactions with Advance America and their affidavits filed in the trial court, they were unable to comply with that order. Ms. Garrett has sought to hold the Petitioners in contempt of court on at least two occasions for failing to file the supersedeas bond as ordered.[1]

On September 20, 2001, the Petitioners appealed the trial court's order requiring them to post a supersedeas bond. On May 9, 2002, the Arkansas Supreme Court dismissed the Petitioners' appeal of that order on the grounds that they had not yet been granted leave to intervene, were therefore not yet parties, and hence had no standing as objecting class members to appeal from that order.

On May 29, 2002, the Petitioners filed their Petition for Rehearing with the Arkansas Supreme Court. At that time, the Petitioners raised the federal constitutional issues of denial of due process and equal protection.

> As objectors only, if it is true that they have no standing to appeal from the Trial Court's order directing them to file a supersedeas bond, it follows that the Trial Court did not have the jurisdiction over them to order them to post the bond in the first place. [FN omitted.] To hold otherwise would deprive the Appellants of property and, potentially, liberty (if the Appellees' attempted contempt sanctions are imposed) without due process of law. In the Matter of Allen, 304 Ark. 222, 800 S.W.2d 715 (1990).

Brief in Support of Petition for Rehearing. (App. G. at 29a-30a.)

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[1] Petitioners filed a Petition for Writ of Prohibition or Certiorari with the Arkansas Supreme Court on the issues of the bond and the threatened contempt, which was denied on December 13, 2001.

> If the Trial Court had the requisite jurisdiction to order the Appellants to post the supersedeas bond and they are not allowed to appeal from that order, they are being denied equal protection under the Fourteenth Amendment to the United States Constitution. Once the State of Arkansas established an appellate procedure for non-parties who have been affected by an order of a trial court, denial of a right to appeal to one class of aggrieved parties violates their right to equal protection under the laws. *See, Lindsey v. Normet*, 405 U.S. 56, 77, 92 S. Ct. 862, 876, 31 L.Ed.2d 36 (1972).

Brief in Support of Petition for Rehearing. (App. G. at 32a.)

On June 12, 2002, the Petitioners filed their Motion to Amend Appellants' Petition for Rehearing (App. H at 34a) to bring to the Arkansas Supreme Court's attention this Court's decision in *Devlin v. Scardelletti*, 536 U.S. ---, 122 S.Ct. 2005, 153 L.Ed.2d 27 (June 10, 2002). On June 13, 2002, the Arkansas Supreme Court denied the Petitioners' Petition for Rehearing. (App. D at 15a.)

On June 20, 2002, the Arkansas Supreme Court then upheld the trial court's order denying the Petitioners' intervention on the grounds that their Motion to Intervene was untimely and on July 5, 2002 dismissed their appeal of the order approving the settlement agreement on the grounds that they had no standing to appeal since they were not parties to the underlying proceedings. On July 5, 2002, the Arkansas Supreme Court also denied the Petitioners' Motion to Amend Appellants' Petition for Rehearing (App. E at 17a), citing its dismissal of their settlement agreement appeal. (App. C at 10a.)

> **Per Curiam.** The Motion to Amend Appellants' Petition for Rehearing is denied pursuant to the recent decision of this court in *Ballard, et al. v. Advance*

America, ___, Ark. ___ S.W. 3d ___ (July 5, 2002), Supreme Court case number 01-1190.

Opinion of the Supreme Court of Arkansas. (App. E at 17a.)

> However, because we found appellants did not timely intervene, appellants do not have standing to bring this appeal. In *Devlin v. Scardelletti et al.*, WL 1270617 (June 10, 2002), the United States Supreme Court determined that unnamed class members, who have objected in a timely manner to approval of a class action settlement at the fairness hearing, have the power to bring an appeal without first intervening, abrogating the lack of standing issue. However, *Devlin* involves facts and issues that are distinguishable from those presented by this appeal. Specifically, *Devlin* addresses a question of law and procedure arising under the Federal Rules of Civil Procedure, and not under Arkansas law. Arkansas Rule of Civil Procedure 23(b) differs from that of Rule 23(b) of the Federal Rules of Civil Procedure. In addition, the petitioner in *Devlin* did not have the ability to opt out of the settlement. Here, appellants had the ability to opt out and instead elected to object to the settlement and risk being bound by it, if approved by the court over their objections.
>
> Accordingly, the *Devlin* opinion is distinguishable from this case on appeal, and this court's opinion in *Haberman v. Lisle*, 318 Ark. 177, 884 S.W.2d 262 (1994), continues to be the controlling precedent in Arkansas. In *Haberman*, the court found that for unnamed class members to have standing to appeal a class-action settlement in state court, those class members must have intervened at the trial court level. *Haberman, supra.* Non-parties and unnamed members of the class who have failed to intervene are

precluded from appealing a class settlement. *Haberman, supra.*

Throughout this litigation, appellants have conceded that *Haberman* is the applicable and controlling law. At a hearing before the circuit court on September 5, 2001, counsel for appellants stated "[t]he Haberman decision from the Arkansas Supreme Court makes it very clear that in order for a party to appeal a settlement agreement, they must be an intervenor. That is the law." Appellants have now changed their position and suggest that *Devlin* gives them the ability to appeal the settlement approval in this case without first intervening. We disagree and continue to follow *Haberman.*

Unlike the petitioner in *Devlin,* appellants here had the ability to opt out of the settlement and avoid being bound by it. Indeed, appellants were ideally positioned to opt out of the settlement because they already had an action pending against Advance America in federal court for the same relief as sought by the class representative in this litigation. By attempting to intervene at the last minute, rather than opting out of a settlement to which they objected, appellants willingly undertook the risk that their motion to intervene might be defied for failure to meet the requirements of Rule 24 (a) of the Arkansas Rules of Civil Procedure, and that they would then be bound by the settlement as approved by the circuit court. Appellants' strategic election not to opt out of the settlement has left them without standing to pursue this appeal. Therefore, by following *Haberman,* appellants have no standing; thus the appeal is dismissed.

Opinion of the Supreme Court of Arkansas. (App. C at 12a-14a.)

The Petitioners asked the Arkansas Supreme Court to reconsider its dismissal of their appeal of the trial court's order approving the settlement and that Petition for Rehearing was denied on September 5, 2002.[2]

REASONS FOR GRANTING THE PETITION

I. The Decision of the Arkansas Supreme Court Conflicts with Recent Precedent of this Court.

The Arkansas Supreme Court unequivocally held that unnamed class members who have not successfully intervened are without standing to appeal a trial court order requiring them to post a supersedeas bond. The Arkansas Supreme Court said:

> In looking at the merits of this issue, we determine that appellants do not have standing to appeal this issue because they are not parties who may take independent action in the underlying class action. Rather, they are class-member objectors at this juncture. Their motion to intervene was denied by the trial court, and unless this court reverses that order in that upcoming appeal, Appellants will not be independent parties to this class action. (emphasis added) (App. A at 5a.)

On June 10, 2002, this Court decided *Devlin v. Scardelletti*, 536 U.S. —, 122 S.Ct. 2005, 153 L.Ed.2d 27 (June 10, 2002). That case held, *inter alia*, that an unnamed class member who timely objects to the terms of a class action settlement has standing to appeal and is a "party" who may appeal. This Court's decision in *Devlin* was timely brought to the attention of the Arkansas Supreme Court by the Petitioners

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[2] A Petition for Certiorari to the Arkansas Supreme Court in that related case is anticipated.

(App. H at 34a) and the issues it raised were considered and ruled upon by that court. (App. E at 17a; App. C at 10a.)

The decision of the Arkansas Supreme Court in this case specifically and categorically rejects *Devlin, id.* As a result, it creates in Arkansas a standard for objecting class members that is not only inconsistent with *Devlin*, but (for the reasons set forth there) denies them due process and equal protection afforded under the Fourteenth Amendment to the United States Constitution.

A. *Devlin v. Scardelletti* Applies to Classes Containing Opt-Out Provisions.

One reason given by the Arkansas Supreme Court for distinguishing this case from *Devlin* is that it involved a non-opt-out class while the class in the instant case contained an opt-out provision. (App. C at 13a.) In explicitly rejecting *Devlin*, the Arkansas Supreme Court said:

> ... the petitioner in *Devlin* did not have the ability to opt out of the settlement. Here, appellants had the ability to opt out and instead elected to object to the settlement and risk being bound by it, if approved by the court over their objections. (App. C at 13a.)
>
> * * *
>
> Unlike the petitioner in *Devlin*, appellants here had the ability to opt out of the settlement and avoid being bound by it. Indeed, appellants were ideally positioned to opt out of the settlement because they already had an action pending against Advance America in federal court for the same relief as sought by the class representative in this litigation. By attempting to intervene at the last minute, rather than opting out of a settlement to which they objected, appellants willingly undertook the risk that their

> motion to intervene might be defied for failure to meet the requirements of Rule 24 (a) of the Arkansas Rules of Civil Procedure, and that they would then be bound by the settlement as approved by the circuit court. Appellants' strategic election not to opt out of the settlement has left them without standing to pursue this appeal. Therefore, by following *Haberman*, appellants have no standing; thus the appeal is dismissed. (App. C at 13a-14a.)

This Court implicitly held on June 17, 2002 that the presence of an opt-out provision was a distinction without a difference in applying the ruling of *Devlin*. See, *Henderson v. General American Life Ins. Co.*, 122 S.Ct. 2584 (June 17, 2002). This result makes sense because a class member's standing arises from the due process considerations that permit a representative to adjudicate the class member's rights in the first place, not as a result of whether there is an opt out provision. *Hansberry v. Lee*, 311 U.S. 32, 61 S.Ct. 115, 85 L.Ed. 22, 132 A.L.R. 741 (1940). Accordingly, the Arkansas Supreme Court's rationale on this point must be rejected.

B. *Devlin v. Scardelletti* Applies to State Court Proceedings.

The other reason given by the Arkansas Supreme Court for distinguishing and rejecting *Devlin* is that *Devlin* dealt with issues arising under Fed. R. Civ. P. 23 while the instant case arose under Ark. R. Civ. P. 23.

> However, *Devlin* involves facts and issues that are distinguishable from those presented by this appeal. Specifically, *Devlin* addresses a question of law and procedure arising under the Federal Rules of Civil Procedure, and not under Arkansas law. Arkansas Rule of Civil Procedure 23(b) differs from that of Rule 23(b) of the Federal Rules of Civil Procedure.

Opinion of Arkansas Supreme Court. (App. C at 12a-13a.)

That justification must also be rejected here. In the first place, this Court has held that state class action rules are subject to federal constitutional protections. *Richardson v. Ramirez*, 418 U.S. 24, 39-40, 94 S.Ct. 2655, 2664, 41 L.Ed.2d 551 (1974); *Hansberry v. Lee, supra.* That would presumably encompass both the due process and equal protection guarantees arising under the Fourteenth Amendment. *Gideon v. Wainwright*, 372 U.S. 335, 83 S. Ct. 792, 9 L.Ed.2d 799, 93 A.LR.2D 733 (1963). The federal constitutional issues of due process and equal protection were timely raised by the Petitioners and were ruled upon by the Arkansas Supreme Court, thereby allowing this Court to exercise jurisdiction in this matter. *Orr v. Orr*, 440 U.S. 268, 99 S.Ct. 1102, 59 L.Ed.2d 306 (1979).

In the second place, the Petitioners submit that the issue of one's standing to appeal a decision arising out of a state class action proceeding is not, strictly speaking, a Rule 23 procedural issue... It is an issue involving the substantive principles of due process and equal protection. Due process is involved since unnamed class members are entitled to those protections before their rights may be affected in the proceeding and equal protection to the extent they are denied the right to appeal otherwise afforded to similarly situated litigants.

II. The Appellate Rule of the Arkansas Supreme Court Denies Equal Protection to the Petitioners and to All Other Similarly Situated Litigants.

Petitioners have standing to petition this Court for equal protection. See, e.g., *Northeastern Florida Chapter of the Associated General Contractors of America v. City of Jacksonville, Florida*, 508 U.S. 656, 666, 113 S.Ct. 2297, 2303, 124 L.Ed.2d 586 (1993). Even though the Petitioners have a direct interest in the outcome of this litigation, the Arkansas appellate rule

in question will also affect all future objecting class members in the State and will deny them equal protection on two fronts: (1) Given their standing as unnamed, objecting class members, they will be denied appellate review that is being otherwise afforded to named parties in class action proceedings; and (2) As persons whose pecuniary interests are affected by the supersedeas order, they will be denied appellate review that is being otherwise afforded to similarly situated persons.

Named parties to a class action proceeding in Arkansas or intervenors therein are afforded access to that State's appellate courts. See, e.g., *Haberman v. Lisle*, 318 Ark. 177 884 S.W.2d 262 (1994). The Petitioners have been denied appellate review solely because they are non-intervening unnamed class members.

In the broader context of non-class action proceedings, the Arkansas Supreme Court (similarly to this Court's reasoning in *Devlin*) has long recognized the right of unnamed parties to appeal where their pecuniary interests are affected by an order of a lower court. See, e.g., *Ouachita Baptist College v. Scott*, 64 Ark. 349, 42 S.W. 536 (1897); *In the Matter of Allen*, 304 Ark. 222, 800 S.W.2d 715 (1990) (trial court's order directing witness to pay $ 10,000 toward care of ward exceeded its jurisdiction); *Hodges v. Gray*, 321 Ark. 7, 901 S.W.2d 1 (1995) (attorney for party permitted to appeal criminal contempt citation against him); *Arkansas State Highway Commission v. Perrin*, 240 Ark. 302, 305, 399 S.W.2d 287, 289-90 (1996) ("No one is aggrieved except the [Highway] commission, and, whether technically a party or not in the County court, appellant certainly is the one affected by the court order. This court has long recognized the right of who feels aggrieved by an order of a court, to appeal to a higher tribunal."); *In re $ 3,166,199*, 337 Ark. 74, 79, 987 S.W.2d 663, 666 (1999) (appeal of Arkansas Highway Patrol allowed to claim portion of res in proceeding to which it was not a named party); *McCoy v. Moore*, 338 Ark. 740, 741,

1 S.W.3d 11, 12 (1999) (appeal dismissed because not timely filed); *Dootson v. State*, 2000 WL 1745267 (Ark. App. 2000) (witness cited for contempt allowed to appeal).

This result is consistent with the laws of Arkansas dealing with the right of appeal. For example, Ark. R. App. P.-Civil 2 does not limit the right of an appeal to a "party." See also, A.C.A. §§ 16-11-302 and 16-65-119.

When the trial court imposed the obligation on the Petitioners to file a $ 750,000.00 supersedeas bond, even though they had not requested a stay pending their appeal of the class action settlement, it implicated their pecuniary interests and exposed them to the contempt powers of that court.[3]

This Court has stated:

> When an appeal is afforded, however, it cannot be granted to some litigants and capriciously or arbitrarily denied to others without violating the Equal Protection Clause. *Griffin v. Illinois, supra; Smith v. Bennett*, 365 U.S. 708, 81 S.Ct. 895, 6 L.Ed.2d 39 (1961); *Lane v. Brown*, 372 U.S. 477, 83 S.Ct. 788, 9 L.Ed.2d 892 (1963); *Long v. District Court of Iowa*, 385 U.S. 192, 87 S.Ct. 362, 17 L.Ed.2d 290 (1966); *Gardner v. California*, 393 U.S. 367, 89 S.Ct. 580, 21 L.Ed.2d 601 (1969). Cf. *Coppedge v. United States*, 369 U.S. 438, 82 S.Ct. 917, 8 L.Ed.2d 21 (1962); *Ellis v. United States*, 356 U.S. 674, 78 S.Ct. 974, 2 L.Ed.2d 1060 (1958).

Lindsey v. Normet, 405 U.S. 56, 77, 92 S.Ct. 862, 876 (1972).

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[3] Ms. Garrett has attempted on two separate occasions to impose contempt sanctions on the Petitioners in spite of their inability to raise the approximately $ 820,000.00 necessary for them to comply with the trial court's order.

The Petitioners are arbitrarily being denied the right to appeal otherwise afforded named class action parties and afforded persons whose pecuniary interests are affected solely because of their status as non-intervening objecting class members. This misguided rule appears to be a relic of the pre-*Devlin* confusion between the Circuit Courts of Appeal on this issue that just refuses to pass. No good reason for this disparity is evident or can withstand examination under the Fourteenth Amendment's gaze.

III. The Appellate Rule of the Arkansas Supreme Court Denies Due Process to the Petitioners and to All Other Similarly Situated Litigants.

If Petitioners are "parties" sufficiently to permit the trial court to enter a supersedeas order against them, they ought to be entitled to due process.

As state above, this Court has held that state class action rules are subject to federal constitutional protections. *Richardson v. Ramirez*, 418 U.S. 24, 39-40, 94 S.Ct. 2655, 2664, 41 L.Ed.2d 551 (1974); *Hansberry v. Lee, supra* ("In all such cases, so far as it can be said that the members of the class who are present are, by generally recognized rules of law, entitled to stand in judgment for those who are not, we may assume for present purposes that such procedure affords a protection to the parties who are represented though absent, which would satisfy the requirements of due process and full faith and credit."); *Gideon v. Wainwright*, 372 U.S. 335, 83 S. Ct. 792, 9 L.Ed.2d 799, 93 A.LR.2D 733 (1963). The federal constitutional issue of due process was timely raised by the Petitioners and was ruled upon by the Arkansas Supreme Court, thereby allowing this Court to exercise jurisdiction in this matter. *Orr v. Orr*, 440 U.S. 268, 99 S.Ct. 1102, 59 L.Ed.2d 306 (1979). This Court has previously stated:

> Thus, this Court has seldom been asked to view access to the courts as an element of due process. The

> legitimacy of the State's monopoly over techniques of final dispute settlement, even where some are denied access to its use, stands unimpaired where recognized, effective alternatives for the adjustment of differences remain. But the successful invocation of this governmental power by plaintiffs has often created serious problems for defendants' rights. For at that point, the judicial proceeding becomes the only effective means of resolving the dispute at hand and denial of a defendant's full access to that process raises grave problems for its legitimacy." (emphasis added.)

Boddie v. Connecticut, 401 U.S. 371, 376, 91 S.Ct. 780, 785, 28 L.Ed.2d 113 (1971).

The Petitioners were given notice of Ms. Garrett's motion to seek an order from the trial court requiring them to post a supersedeas bond, timely objected and were ordered to post a $ 750,000.00 bond. Nevertheless, they have been denied the right to be heard on appellate review of that decision.

In essence, they are being denied due process because the Arkansas rules of standing are being used to subject them to obligations in its judicial system, while denying them access to the appellate courts.

IV. The Question Presented is Important.

This Court has stated that it, and not the state courts, is to be the final arbiter of federal constitutional questions and may make such disposition of the case as justice requires. *State of Minnesota v. National Tea Company*, 309 U.S. 551, 557, 60 S.Ct. 676, 679, 84 L.Ed. 920 (1940).

The rule adopted by the Arkansas Supreme Court as to non-intervening objecting class members eliminates their

access to the appellate courts of the State for all purposes and will affect their rights in all future class litigation. The fact that the Arkansas Supreme Court's opinions dismissing the Petitioners' appeals of the settlement agreement and the supersedeas bond have been designated for publication demonstrates that court's intention to apply those decisions in future class action litigation.

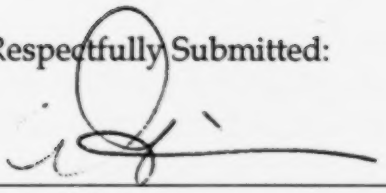
Objecting class members or class members subjected to other orders of the trial court cannot predict with any certainty whether they will be allowed to intervene and yet will continue to be subject to orders affecting their property or liberty interests. If intervention is allowed to remain as the key to the Arkansas Supreme Court's chambers, these persons' due process and equal protection rights will be granted or denied in the discretion of the trial court. These rights should be absolute and assured to all who are affected by those proceedings.

CONCLUSION

If the Petitioners, who timely objected to the proposed settlement and appealed from the order approving it, have enough standing for due process to permit a trial court to order them to post a $ 750,000.00 supersedeas bond, it is a denial of due process to deny them an opportunity to be heard on appeal. Moreover, since the courts of Arkansas permit appeals by named class members and defendants in class actions and by others whose pecuniary and liberty interests are implicated by a trial court's order, the Petitioners and all future objecting class members are being denied equal protection under the law if they are arbitrarily denied the same rights of appeal.

The Petitioners respectfully request this Court to enter its order reversing and remanding these proceedings to the Arkansas Supreme Court for proceedings in conformity with this Court's ruling.

Respectfully Submitted:



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APPENDIX

The Appendix is in a separate volume submitted herewith.

Supreme Court, U.S.
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OFFICE OF THE CLERK

No. _____

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CASH ADVANCE CENTERS OF ARKANSAS, INC.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARKANSAS

Appendix to
PETITION FOR WRIT OF CERTIORARI

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APPENDIX A

SUPREME COURT OF ARKANSAS

No. 01-1182

CRYSTAL LUEBBERS, TERESA BALLARD, KENISHA BRYANT, and CHERYL KING, APPELLANTS, VS. ADVANCE AMERICA, CASH ADVANCE CENTERS OF ARK., INC., APPELLEES,	Opinion Delivered MAY - 9 2002 APPEAL FROM THE CLARK COUNTY CIRCUIT COURT, NO. CIV 99-152 HON. JOHN ALEXANDER THOMAS JUDGE, APPEAL DISMISSED.

JIM HANNA, Associate Justice

Appellants Crystal Luebbers[1], Teresa Ballard, Kenisha Bryant, and Cheryl King appeal the Clark County Circuit Court's Order requiring them to post a $750,000 bond to stay the execution of a court-approved settlement between members of a class, to which appellants belong, and Appellee Advance America Cash Advance Centers of Arkansas, Inc., (Advance America).

This limited appeal is part of a larger class-action lawsuit between a class of approximately 19,000 members and Advance America, a check-cashing company. Appellants here are class members of the plaintiff class. Appellee Phyllis Garrett is a designated representative of the class. On July

[1] Although Crystal Luebbers is named as an appellant in this action, the trial court granted her motion to withdraw as a party of record in this matter on December 5, 2001.

18, 2001 the circuit court approved a settlement agreement between Advance America and the class through its representatives. Appellants disapproved of this settlement agreement, and their disapproval has spawned several appeals.

Appellants first filed a motion to intervene as separate parties in the class action, after the settlement was struck. The circuit court denied this motion. The appellants filed their first notice of appeal from this denial on August 10, 2001. This appeal was docketed as CA 01-1218. Appellants lodged a partial record in connection with this appeal.

Also on August 10, 2001, appellants filed a second notice of appeal, appealing the circuit court's order approving the settlement agreement. This appeal was docketed as CA 01-1190. On November 2, 2001, appellants lodged a complete record of proceedings with this court for this second appeal.

In response to the two notices of appeal filed on August 10, 2001, the class representatives filed a motion for appellants to post a supersedeas bond. The circuit court ordered hearing on the matter for September 5, 2001, and on September 11, 2001, the circuit court granted the motion to post bond and ordered the appellants to post the bond in the amount of $750,000. On September 20, 2001, appellants filed a third notice of appeal seeking appellate review of the bond requirement. This appeal is docketed as CA 01-1182. Appellants lodged a partial record for this third appeal. This is the subject of this current appeal before the court.

On October 3, 2001, the class representatives filed a motion to strike the September 20, 2001, notice of appeal in CA 01-1182, which dealt with the appeal of the order to post a supersedeas bond. On November 2, 2001, the class representatives filed a motion to show cause why the appellants here should not be held in contempt for failing to comply with the circuit court's order to post bond. The

motion to strike and the contempt issue were set for hearing the trial court on December 10, 2001. On December 5, 2001, the December 10, 2001, hearing was temporarily stayed by this court pending our decision on the appellants' petition for writ of prohibition requesting this court to prohibit the trial court from striking their notice of appeal from the settlement-approval order. We granted the appellants' petition for writ of prohibition on December 13, 2001.

On November 13, 2001, the appellants filed a petition for writ of prohibition or for certiorari to bar the circuit court from requiring a supersedeas bond. This petition was docketed as 01-1251. Three days later, on November 16, 2001, the appellants filed a second petition for writ of prohibition to bar the circuit court from striking their notice of appeal. This petition was docketed as 01-1268. On December 13, 2001, this court denied the appellants's [sic] petition for writ of certiorari to bar the circuit court from requiring a supersedeas bond, holding that because the circuit court's order to post the bond was entered prior to the filing of the appeals, the circuit court still maintained jurisdiction to enter such order. As such, this court determined that the record on its face did not indicate that the trial court was "wholly without jurisdiction," and a writ of certiorari was improper. This decision, however, did not reach the merits as to whether the circuit court could require appellants to post such a bond, the issue that is before us now. Also on December 13, 2001, this court granted the appellants's [sic] petition for writ of prohibition to prohibit the circuit court from dismissing their appeal from the circuit court's order approving the settlement. We determined that dismissal of an appeal is not a proper matter for the trial court, and the circuit court no longer had jurisdiction to act on the motion to dismiss because the records had been filed in the appeals.

Appellants now ask us to determine whether the trial court erred in granting the class representative's motion to

require appellants to post a supersedeas bond for a stay pending their appeal of the underlying orders approving the class-action settlement and denying appellants's [sic] motion to intervene.

On appeal, the appellants make three arguments. First, they argue that the trial court did not have the authority under Arkansas Rule of Civil Procedure 62(d) and Arkansas Rule of Appellate Procedure-Civil 8 to order them to post a supersedeas bond when they had not requested a stay pending appeal of the trial court's order approving the settlement between the class and Advance America. They note that we have no cases directly on point, but several federal courts have addressed this exact issue under Federal Rule of Civil Procedure 62(d) and have held that the trial court cannot require the posting of a bond when no stay has been requested. Second, appellants argue that the trial court cannot maintain a contempt action against them for failure to comply with the court's order to post the bond because the bond requirement may only follow the request of a stay, and no party has requested a stay in this action. Therefore, failure to comply with the posting of the order also cannot be reached. Third, appellants argue that if this court determines that the trial court acted within its authority to require the bond, the trial court abused its discretion in this case in ordering them to post a bond for $750,000. The appellants assert that they do not have the means to post that much for a bond, as evidenced by the fact they were part of a class of people who had to get payday advances from Advance America, resulting in this action in the first place. They argue that requiring a bond here would, in effect, be a denial of due process to people who cannot afford to appeal if the bond is required.

Advance America argues in response that the trial court had the authority to order the appellants to post the supersedeas bond because the trial court retained jurisdiction since the record had not been lodged in the

underlying appeal. It also asserts that these same arguments were made in the appellants's [sic] petition for writ of prohibition, and that this court denied the arguments then. Second, Advance America asserts that the trial court can hold appellants in contempt for failing to comply with an order of the court. Absent a supersedeas, a trial court retains jurisdiction to enforce its orders, and no supersedeas was filed here. Third, Advance America argues that the trial court did not err in requiring the appellants to post a bond because courts determine on a case-by-case basis the extent to which a judgment is in jeopardy and require sufficient security to protect that judgment. Fourth, Advance America argues that the appellants's [sic] appeal is premature because an order to post bond is not a final appealable order from which an appeal may be had. The trial court is still considering the matter after it held a show-cause hearing on January 14, 2002, and there is no indication as to whether the court will require, through a contempt order, the bond to be posted. Finally, Advance America argues that the appellants lack standing here because they have not been aggrieved by the order because they have not posted the bond to date. The class representative, too, filed a brief, arguing essentially the same matters as did Advance America in its points on appeal.

In looking at the merits of this issue, we determine that appellants do not have standing to appeal this issue because they are not parties who may take independent action in the underlying class action. Rather, they are class-member objectors at this juncture. Their motion to intervene was denied by the trial court, and unless this court reverses that order in that upcoming appeal. Appellants will not be independent parties to this class action.

We are cognizant of the fact that in the class action, they are members of the plaintiff class. However, the general rule is that class members lack standing to appeal a decision approved by the class representatives. *Haberman v. Lisle*, 318

Ark. 177, 884 S.W. 2d 262 (1994) (citing *Croyden Assoc. v. Alleco, Inc.*, 969 F.2d 675 (8th Cir. 1992)[2]). However, in *Haberman* we stated:

> We point out, though, that an unsatisfied class member is not without alternatives. An unsatisfied class member's options are to move to intervene as of right, collaterally attack the settlement approval by filing a separate suit challenging the adequacy of the class representation, or he may opt out. *See Croyden*, 969 F.2d 675, 678. The rationale of the class action is to render manageable litigation involving numerous class members who would otherwise all have access to court via individual lawsuits. As was emphasized in *Croyden*, if each dissatisfied class member could appeal individually, litigation would be uncontrollable, and the purpose of class actions would be defeated.

Haberman, 318 Ark. at 180. Here, appellants did not opt out, nor did they file a lawsuit to challenge the adequacy of the class representation. Therefore, their only recourse was to attempt to intervene, which they have tried to do. The trial court, however, denied this motion, and appellants have appealed that decision, which they may do. *See Cupples Farms Partner v. Forrest City Prod. Credit*, 310 Ark. 597, 839 S.W.2d 187 (1992). However, until their intervention issue is decided, the appellants are not independent parties to this action, other

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[2] The Eighth Circuit Court of Appeals in *Croyden, supra*, determined that unnamed class members who object to a settlement must move to intervene, and they will be denied standing to appeal if they have not done so. *Croyden* relies in part on *Marino v. Ortiz*, 484 U.S. 301 (1988), in which the Supreme Court held that settlement objectors who were not class members, but who would have been affected by the settlement, could not appeal from the settlement order because they had not intervened and, thus, were not parties to the action. *Croyden* and *Guthrie v. Evans*, 815 F.2d 626 (11th Cir. 1987), in particular, have extended *Marino's* holding to apply to unnamed class members who have yet to successfully intervene, such as the appellants here.

than as class-member objectors who have no right to independently appeal the class settlement. Therefore, it follows that the appellants are not "parties" to the class-action proceeding and, as such, cannot appeal a ruling by the trial court on an order to post a bond. Because we dismiss this appeal due to the appellant's lack of standing, we do not reach any other issues in this appeal.

Appeal dismissed.

GLAZE, J., not participating.

APPENDIX B

IN THE CIRCUIT COURT OF CLARK COUNTY, ARKANSAS
Civil Division

PHYLLIS GARRETT, individually and o/b/o a class of similarly situated persons — PLAINTIFF

VS. — CIV-99-152

ADVANCE AMERICA — DEFENDANT

ORDER

Came on for hearing on the 5th day of September, 2001, and the Plaintiffs appearing through counsel, Todd Turner and Dan Turner, and the Defendant, Advance America, appearing through Claire Hancock, and David G. Nixon, appearing as the attorney for Teresa Ballard, Kenisha Bryant, Cheryl King and Crystal Luebbers, and the Court having considered the pleadings filed and arguments of counsel, does hereby find as follows:

1. For good cause shown, the Objectors are hereby ordered to post a bond in the amount of $750,000 pending the appeal in this action and the Plaintiff's request for additional notice is denied.

IT IS SO ORDERED.
"s/John A. Thomas
HON. JOHN A. THOMAS
9/10/01

DATE

Clerk mail copies to:
Todd Turner, *esquire*
Claire Hancock, *esquire*
David Nixon, *esquire*

Filed for Record 11th
day of Sep. 2001 at
11:05 o'clock
PAMELA D. KING,
Circuit Clerk
By "s/Tanya E. Talbro
Deputy Clerk

APPENDIX C

SUPREME COURT OF ARKANSAS
No. 01-1190

TERESA BALLARD, ET AL., APPELLANTS, VS. ADVANCE AMERICA, CASH ADVANCE CENTERS OF ARKANSAS, INC., AND PHYLLIS GARRETT, APPELLEES,	Opinion Delivered JUL 05 2002 APPEAL FROM THE CLARK COUNTY CIRCUIT COURT, NO. CIV 99-152 HON. JOHN ALEXANDER THOMAS JUDGE, DISMISSED.

W.H. "DUB" ARNOLD, Chief Justice

This appeal arises from an order of the Clark County Circuit Court approving a settlement of all possible claims against appellee Advance America, Cash Advance Centers of Arkansas, Inc., and all of its officers, shareholders, and sureties for cash in the amount of $750,000 and forgiveness of approximately $550,000 in checks it held that had been returned unpaid due to insufficient funds.

The case began as a class action usury suit that was filed by appellee, Phyllis Garrett, against appellee, Advance America Cash Advance Centers of Arkansas, Inc., on October 12, 1999. On April 9, 2001, a conditional settlement class was certified, and on May 2, 2001, a proposed settlement agreement was preliminarily approved, and notice was given to class members. This notice informed the members that a fairness hearing would be held on July 18,

2001, and that potential class members were given until June 30, 2001, to opt out of the class.

Appellants, Teresa Ballard, Cheryl King, and Kenisha Bryant, filed a motion seeking to intervene in the action on July 6, 2001. On July 16, 2001, a hearing was held on appellants' motion. On July 18, 2001, the trial court found that appellants' motion to intervene was untimely, that appellants' interest was adequately represented, and the trial court denied the motion to intervene.

On July 18, 2001, the previously scheduled fairness hearing was held. Following the fairness hearing, the settlement was approved and appellants' [sic] appealed from the trial court's denial of their motion to intervene. This court affirmed the trial court in *Ballard v. Garrett,* ____ Ark. _____S.W.3d ____ (June 20, 2002).

In that case, this court upheld the trial court's order that appellants' motion to intervene was filed after the litigation had progressed too far, and held that there was no abuse of discretion by the trial court. *Id.* We stated that appellants sat on their rights and waited until they were not satisfied with the way the litigation was progressing. *Id.* We concluded that the trial court did not abuse its discretion when it determined that the proceedings had advanced so far that apellants' motion to intervene was not timely. *Id.* Further, we found that allowing the intervention would have delayed the entry of the proposed settlement and would have delayed the class members' ability to collect their compensation. *Id.* Finally, in that case, we concluded that appellants did not have a valid reason for delaying the filing of their motion to intervene until fifteen months after the litigation had begun or two months after a proposed settlement had been reached. *Id.* Accordingly, we held that the trial court did not err in denying appellants' motion.

Therefore, in *Ballard v. Garrett*, we held that the trial court did not abuse its discretion when it found that appellants' motion to intervene was untimely. This court stated the trial court did not abuse its discretion because (1) appellants waited until the litigation had progressed too far before they filed their motion to intervene; (2) the granting of appellants' untimely motion would have caused the other parties to the litigation to suffer prejudice; and (3) appellants failed to provide a valid reason for their delay in filing their motion to intervene.

While *Ballard v. Garrett* was pending before this court, Teresa Ballard, Cheryl King, and Kenisha Bryant filed another appeal with this court, also from Clark County Circuit Court. In this appeal, appellant raised four points: (1) the trial court abused its discretion in finding that the settlement agreement was fair, reasonable, and adequate; (2) the trial court abused its discretion in naming Garrett as class representative and naming her attorneys as class counsel; (3) the trial court erred in admitting and excluding certain evidence; and (4) the trial court erred in quashing the appellants' subpoena on Advance America, denying them the right to cross-examine witnesses and refusing to allow them to review and argue from a plaintiff's sealed exhibit.

However, because we found appellants did not timely intervene, appellants do not have standing to bring this appeal. In *Devlin v. Scardelletti et al.*, WL 1270617 (June 10, 2002), the United States Supreme Court determined that unnamed class members, who have objected in a timely manner to approval of a class action settlement at the fairness hearing, have the power to bring an appeal without first intervening, abrogating the lack of standing issue. However, *Devlin* involves facts and issues that are distinguishable from those presented by this appeal. Specifically, *Devlin* addresses a question of law and procedure arising under the Federal Rules of Civil Procedure, and not under Arkansas law. Arkansas Rule of

Civil Procedure 23(b) differs from that of Rule 23(b) of the Federal Rules of Civil Procedure. In addition, the petitioner in *Devlin* did not have the ability to opt out of the settlement. Here, appellants had the ability to opt out and instead elected to object to the settlement and risk being bound by it, if approved by the court over their objections.

Accordingly, the *Devlin* opinion is distinguishable from this case on appeal, and this court's opinion in *Haberman v. Lisle*, 318 Ark. 177, 884 S.W.2d 262 (1994), continues to be the controlling precedent in Arkansas. In *Haberman*, the court found that for unnamed class members to have standing to appeal a class-action settlement in state court, those class members must have intervened at the trial court level. *Haberman, supra*. Non-parties and unnamed members of the class who have failed to intervene are precluded from appealing a class settlement. *Haberman, supra*.

Throughout this litigation, appellants have conceded that *Haberman* is the applicable and controlling law. At a hearing before the circuit court on September 5, 2001, counsel for appellants stated "[t]he Haberman decision from the Arkansas Supreme Court makes it very clear that in order for a party to appeal a settlement agreement, they must be an intervenor. That is the law." Appellants have now changed their position and suggest that *Devlin* gives them the ability to appeal the settlement approval in this case without first intervening. We disagree and continue to follow *Haberman*.

Unlike the petitioner in *Devlin*, appellants here had the ability to opt out of the settlement and avoid being bound by it. Indeed, appellants were ideally positioned to opt out of the settlement because they already had an action pending against Advance America in federal court for the same relief as sought by the class representative in this litigation. By attempting to intervene at the last minute, rather than opting out of a settlement to which they objected, appellants

willingly undertook the risk that their motion to intervene might be defied for failure to meet the requirements of Rule 24 (a) of the Arkansas Rules of Civil Procedure, and that they would then be bound by the settlement as approved by the circuit court. Appellants' strategic election not to opt out of the settlement has left them without standing to pursue this appeal. Therefore, by following *Haberman,* appellants have no standing; thus the appeal is dismissed.

Appeal dismissed.

GLAZE, J., not participating.

APPENDIX D

Leslie W. Steen
Clerk
Robin Horne
Chief Deputy Clerk
Melissa Fuller
Chief Deputy Clerk
Jeanne Matthews
Records Supervisor

Office of the Clerk
Supreme Court of
the State of
Arkansas
Arkansas Court of
Appeals
Justice Building
625 Marshall Street
Little Rock,
Arkansas 72201

Deputy Clerks:
Denise Parks
Daniel Dodson
Holli North
Ginger Mullins
Joan Owens
Debbie Cates
Renee Herndon
Bobby Jackson
Sue Clayton
Lynda Boone

June 13, 2002

David Glen Nixon
Paige E. Young
The Nixon Law Firm
2340 Green Acres Road, Suite 12
Fayetteville, AR 72703

RE: 01 01182. Crystal Luebbers et al. v. Phyllis Garrett et al.

Dear Attorneys:

The Arkansas Supreme Court made the following order today in the above styled case:

"Petition for rehearing is denied. Glaze, J., not participating."

Sincerely,

"s/Leslie W. Steen"
Leslie W. Steen, Clerk

LWS:jko

cc: Todd Martin Turner
Claire Shows Hancock
Robert M. Buell
Betty L. Clower, clerk
(CIV99-152)

APPENDIX E

TERESA BALLARD; Kenisha Bryant; Cheryl King; and Crystal Luebbers v. ADVANCE AMERICA, Cash Advance Centers of Arkansas, Inc.

01-1182 ___ S.W.3d ___

Supreme Court of Arkansas

Opinion delivered July 5, 2002

Motions - motion to amend appellants' petition for rehearing - denied. - The motion to amend appellants' petition for rehearing was denied pursuant to the recent decision of the supreme court in *Ballard v. Advance America*, 349 Ark. ___, ___ S.W. 3d ___ (2002).

Motion to Amend Appellants' Petition for Rehearing; denied.

The Nixon Law Firm, by: David G. Nixon and Paige E. Young, for appellants.

No response.

Per Curiam. The Motion to Amend Appellants' Petition for Rehearing is denied pursuant to the recent decision of this court in *Ballard, et al. v. Advance America,* ___, Ark. ___ S.W. 3d ___ (July 5, 2002), Supreme Court case number 01-1190.

Motion denied.

Glaze, J., not participating.

APPENDIX F

AMENDMENT XIV. CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPOINTMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member

of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

A.C.A. § 16-11-302

ARKANSAS CODE OF 1987 ANNOTATED

TITLE 16. PRACTICE, PROCEDURE, AND COURTS

SUBTITLE 2. COURTS AND COURT OFFICERS

CHAPTER 11. SUPREME COURT

SUBCHAPTER 3. PROCEDURAL RULES

16-11-302 Pleading, practice, and procedure in civil cases.

(a) The Supreme Court of Arkansas shall have the power to prescribe, from time to time, rules of pleading, practice, and procedure with respect to any and all proceedings in civil cases in all courts in this state. However, the court shall not have the power to prescribe rules in conflict with laws of this state relating to stays and continuances of proceedings in suits in which a member of the General Assembly, an officer of the General Assembly, or a designated employee of the General Assembly is an attorney or a party in the proceeding.

(b) The rules shall not abridge, enlarge, or modify any substantive right and shall preserve the right of trial by jury as at common law and as declared by Arkansas Constitution, Article 2, § 7, as amended by Arkansas Constitution, Amendment 16.

(c) The right of appeal shall continue in those cases in which appeals are authorized by law, but the rules made as authorized in this section may prescribe the times for, and manner of, taking appeals.

(d) The Supreme Court may fix the dates when these rules shall take effect and the extent to which they shall apply to proceedings then pending.

(e) All laws in effect on July 24, 1973, regarding pleading, practice, and procedure in civil proceedings in the courts of this state and those relating to the time and manner of taking appeals in civil proceedings shall remain in effect only until such time as the Supreme Court prescribes rules regarding them or until the laws are repealed or revised by legislative action.

(f) Nothing in this section, anything herein to the contrary notwithstanding, shall in any way limit, supersede, or repeal any such rules previously prescribed by the Supreme Court.

History. Acts 1973, No. 38, §§ 1-6; 1979, No. 333, § 2; 1981, No. 312, § 3; A.S.A. 1947, §§ 22-245 -- 22-249, 22-249n.

A.C.A. § 16-65-119

ARKANSAS CODE OF 1987 ANNOTATED

TITLE 16. PRACTICE, PROCEDURE, AND COURTS

SUBTITLE 5. CIVIL PROCEDURE GENERALLY

CHAPTER 65. JUDGMENTS GENERALLY

SUBCHAPTER 1. GENERAL PROVISIONS

16-65-119 Reversal, modification, or vacation of judgment.

(a) A judgment rendered, or final order made, in the circuit or chancery court may be reversed, vacated, or modified, either by the Supreme Court or by the court in which the judgment was rendered, or order made.

(b) A judgment or final order may be reversed or modified by the Supreme Court for errors appearing in the record.

(c) The proceedings to obtain the reversal or modification shall be by appeal, prosecuted as prescribed by law.

History. Civil Code, §§ 566-568; C. & M. Dig., §§ 6285-6287; Pope's Dig., §§ 8241-8243; A.S.A. 1947, §§ 29-501 – 29-503.

RULES OF APPELLATE PROCEDURE - CIVIL

RULE 2. APPEALABLE MATTERS; PRIORITY

(a) An appeal may be taken from a circuit court to the Arkansas Supreme Court from:

1. A final judgment or decree entered by the circuit court;

2. An order which in effect determines the action and prevents a judgment from which an appeal might be taken, or discontinues the action;

3. An order which grants or refuses a new trial;

4. An order which strikes out an answer, or any part of an answer, or any pleading in an action;

5. An order which vacates or sustains an attachment or garnishment;

6. An interlocutory order by which an injunction is granted, continued, modified, refused, or dissolved, or by which an application to dissolve or modify an injunction is refused;

7. An interlocutory order appointing a receiver, or refusing to wind up a pending receivership or to take the appropriate steps to accomplish the purposes thereof, such as directing a sale or other disposal of property held thereunder;

8. An order which disqualifies an attorney from further participation in the case;

9. An order granting or denying a motion to certify a case as a class action in accordance with Rule 23 of the Arkansas Rules of Civil Procedure;

10. An order denying a motion to dismiss or for summary judgment based on the defense of sovereign immunity or the immunity of a government official;

11. An order or other form of decision which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties in a case involving multiple claims, multiple parties, or both, if the circuit court has directed entry of a final judgment as to one or more but fewer than all of the claims or parties and has made an express determination, supported by specific factual findings, that there is no just reason for delay, and has executed the certificate required by Rule 54(b) of the Rules of Civil Procedure; and

12. An order appealable pursuant to any statute in effect on July 1, 1979, including Ark. Code Ann. § 16-108-219 (an order denying a motion to compel arbitration or granting a motion to stay arbitration, as well as certain other orders regarding arbitration) and § 28-1-116 (all orders in probate cases, except an order removing a fiduciary for failure to give a new bond or render an accounting required by the court or an order appointing a special administrator).

(b) An appeal from any final order also brings up for review any intermediate order involving the merits and necessarily affecting the judgment.

(c) Appeals in juvenile cases shall be made in the same time and manner provided for appeals from circuit court.

1. In delinquency cases, the state may appeal only under those circumstances that would permit the state to appeal in criminal proceedings.

2. Pending an appeal from any case involving a juvenile out-of-home placement, the circuit court retains jurisdiction to conduct review hearings.

3. In juvenile cases where an out-of-home placement has been ordered, orders resulting from the hearings set below are final appealable orders:

(A) adjudication and disposition hearings;

(B) review and permanency planning hearings if the court directs entry of a final judgment as to one or more of the issues or parties and upon express determination supported by factual findings that there is no just reason for delay of an appeal, in accordance with Ark. R. Civ. P., Rule 54(b); and

(C) termination of parental rights.

(d) All final orders awarding custody are final appealable orders.

(e) Appeals in criminal cases have priority over all other business. With respect to civil cases, appeals under subdivisions (a)(6), (a)(7), (a)(9), (c)(3), and (d) of this rule take precedence.

[Effective January 1, 1996; amended effective March 4, 1999; amended effective January 27, 2000; amended effective February 1, 2001; amended effective July 1, 2001.]

APPENDIX G

IN THE SUPREME COURT OF ARKANSAS

[Filed May 29, 2002]

CRYSTAL LUEBBERS, TERESA BALLARD, KENISHA BRYANT and CHERYL KING, — APPELLANTS

v. NO. 01-1182

PHYLLIS GARRETT, individually and o/b/o a class of similarly situated persons; and ADVANCE AMERICA, CASH ADVANCE CENTERS OF ARKANSAS, INC., — APPELLEES

APPELLANTS' PETITION FOR REHEARING

COME NOW, TERESA BALLARD, KENISHA BRYANT, and CHERYL KING, the Appellants herein, by and through THE NIXON LAW FIRM, their attorneys of record, and pursuant to Ark. S. Ct. R. 2-3 submit their Petition for Rehearing and request this Court to reconsider and set aside its May 9, 2002 Order dismissing this appeal, reinstate the same, and grant them such other and further relief to which they may be entitled.

Certificate of Counsel

I hereby certify, pursuant to Ark. S. Ct. R. 2-3(a), that this Petition for Rehearing is filed in good faith and not for purposes of delay.

Respectfully submitted:
"s/David G. Nixon"
David G. Nixon (ABA #88048)
Paige E. Young (ABA #99123)
THE NIXON LAW FIRM
2340 Green Acres Road,
Suite 12
Fayetteville, AR 72703
Phone: (501) 582-0020
Fax: (501) 582-0030

Attorneys for Teresa Ballard, Kenisha Bryant, and Cheryl King

Certificate of Service

I, David G. Nixon, do hereby certify that on the 28th day of May 2002 I caused a true and correct photocopy of the within and foregoing document, with exhibits, if any, to be served on those persons shown below via U.S. First Class Mail, to wit:

Hon. John A. Thomas
CLARK COUNTY CIRCUIT JUDGE
P.O. Box 966
Arkadelphia, AR 71923

Todd Turner
MORGAN & TURNER
210 N. 10th Street
P.O. Box 579
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IN THE SUPREME COURT OF ARKANSAS

[Filed May 29, 2002]

TERESA BALLARD; KENISHA BRYANT; and CHERYL KING — APPELLANTS

v. — No. 01-1182

PHYLLIS GARRETT, individually and o/b/o a class of similarly situated persons; and ADVANCE AMERICA, CASH ADVANCE CENTERS OF ARKANSAS, INC., — APPELLEES

BRIEF IN SUPPORT OF PETITION FOR REHEARING

COME NOW, TERESA BALLARD, KENISHA BRYANT, and CHERYL KING, the Appellants herein, and submit this Brief in support of their Petition for Rehearing filed contemporaneously herewith:

I. The Court's May 9, 2002 Order Results in a Denial of Due Process

Under the due process clause of the Fourteenth Amendment to the United States Constitution, a person may not be deprived of property or liberty without due process of law.[1] In the instant case, this Court properly observed that the Appellants were not parties to the underlying litigation, had not been sued, and had not been served with service of process. As objectors only, if it is true that they have no standing to appeal from the Trial Court's order directing

[1] The Fourteenth Amendment has been made applicable to the states. *See, e.g.*, Gideon v. Wainwright, 372 U.S. 335, 83 S. Ct. 792, 9 L.Ed.2d 799, 93 A.LR.2D 733 (1963)

them to file a supersedeas bond, it follows that the Trial Court did not have the jurisdiction over them to order them to post the bond in the first place.[2] To hold otherwise would deprive the Appellants of property and, potentially, liberty (if the Appellees' attempted contempt sanctions are imposed) without due process of law. In the Matter of Allen, 304 Ark. 222, 800 S.W.2d 715 (1990).

II. The Appellants Qualify for an Exception to the Haberman Standing Rule.

As this Court knows, the Appellants already sought, unsuccessfully, to challenge the subject matter jurisdiction of the Trial Court in this matter by way of a Petition for Writ of Prohibition in Case No.01-1251. This Court rejected that attempt "because the circuit court's order to post the bond was entered prior to the filing of the appeal, [therefore] the circuit court still maintained jurisdiction to enter such order." Luebbers v. Advance America Cash Advance Centers of Arkansas, Inc., ---S.W.3d---, 2002 WL 937685 (May 09, 2002). That decision did not go to the issues raised in this appeal.

If the Trial Court did have jurisdiction to order the Appellants to post the supersedeas bond, this Court has long recognized an exception to the general rule that one must be a party in order to have standing to appeal. That exception exists where one has a pecuniary or liberty interst affected by the Trial Court's decision. Arkansas State Highway Commission v. Perrin, 240 Ark. 302, 305, 399 S.W.2d287, 289-90 (1966) ("No one is aggrieved except the [Highway] commission, and, whether technically a party or not in the County court, appellant certainly is the one affected by the court order. This court has long recognized the right of who feels aggrieved by an order of a court, to appeal to a higher

---

[2] Subject matter jurisdiction may be raised at any time, including for the first time appeal. Terry v. Lock, 343 Ark. 452, 37 S.W.3d 202 (2001).

tribunal.") In the Matter of Allen, 304 Ark. 222, 800 S.W.2d 715 (1990) (trial court's order directing witness to pay $10,000 toward care of ward exceeded its jurisdiction); Hodges v. Gray, 321 Ark. 7, 901 S.W.2d 1 (1995) (attorney for party permitted to appeal criminal contempt citation against him); Dootson v. State, 2000 WL 1745267 (Ark. App. 2000) (witness cited for contempt allowed to appeal).

The above exception should apply in the instant appeal. Appellants are not, by this appeal, seeking a review of the Trial Court's order approving the settlement, which affects them indirectly. If the Trial Court's Order directing the Appellants to post a $ 750,000.00 supersedeas bond was valid, it affected the Appellants' pecuniary interest directly - not vicariously as in Haberman v. Lisle, 318 Ark. 177 884 S.W.2d 262 (1994) - and justifies this Court's exercise of jurisdiction over their appeal from that Order.

This approach would be consistent with principles of standing enunciated under the Fourteenth Amendment to the United States Constitution, as well. If the Trial Court's Order was valid, it constituted a real impairment of the Appellants' property and/or liberty interests sufficient to give them standing to appeal. Arizonans for Official English v. Arizona, 520 U.S. 43, 64, 117 S.Ct. 1055, 1067 (1997) ("To qualify as a party with standing to litigate, a person must show, first and foremost, 'an invasion of a legally protected interest' that is 'concrete and particularized' and '"actual or imminent."'"); Martin-Trigona v. Shiff, 702 F.2d 380 (2nd Cir. 1983) (trustees in bankruptcy had standing to appeal from order granting debtor's *habeas corpus* petition).

Alternatively, since this Court's May 9 Order depends on its finding that the intervention issue is still unresolved, the rationale of Mausolf v. Babbitt, 125 F.3d 661, 28 Envtl. L. Rep. 20,057 (8th Cir. 1997) would suggest holding the matter open until intervention is decided. The problem with adopting such an approach, however, is that if intervention

is ultimately denied, the standing and due process problems would still remain.

III. The Court's May 9, 2002 Order Results in a Denial of Equal Protection.

If the Trial Court had the requisite jurisdiction to order the Appellants to post the supersedeas bond and they are not allowed to appeal from that order, they are being denied equal protection under the Fourteenth Amendment to the United States Constitution. Once the State of Arkansas established an appellate procedure for non-parties who have been affected by an order of a trial court, denial of a right to appeal to one class of aggrieved parties violates their right to equal protection under the laws. *See*, Lindsey v. Normet, 405 U.S. 56, 77, 92 S. Ct. 862, 876, 31 L.Ed.2d 36 (1972) ("This Court has recognized that if a full and fair trial on the merits is provided, the Due Process Clause of the Fourteenth Amendment does not require a State to provide appellate review. When an appeal is afforded, however, it cannot be granted to some litigants and capriciously or arbitrarily denied to others without violating the Equal Protection Clause." (Citations omitted.)); Williams v. Oklahoma City, 395 U.S. 458, 459, 89 S. Ct. 1818, 1819 23 L.Ed.2d 440 (1969) ('This Court has never held that the States are required to establish avenues of appellate review, but it is now fundamental that, once established, these avenues must be kept free of unreasoned distinctions that can only impede open and equal access to the courts.")

In the instant case, if the Trial Court's order requiring them to post a $ 750,000 supersedeas bond is not subject to a writ of prohibition and is also not appealable, the Appellants life, liberty and property interests are being directly affected, but they are left with no recourse to this Court at all. This may not be the intended effect of the Court's May 9 Order, but - given the procedural history and posture of this case - that will be the result.

IV. Conclusion.

For all of the above reasons, the Appellants respectfully request this Court reconsider and set aside its May 9, 2002 Order dismissing this appeal, reinstate the same, and grant them such other and further relief to which they may be entitled.

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APPENDIX H

IN THE SUPREME COURT OF ARKANSAS

[Filed June 12, 2002]

TERESA BALLARD; KENISHA BRYANT; CHERYL KING; and CRYSTAL LUEBBERS — APPELLANTS

NO. 01-1182

PHYLLIS GARRETT, Individually, and o/b/o a class of similarly situated persons; and ADVANCE AMERICA, CASH ADVANCE CENTERS OF ARKANSAS, INC. — APPELLEES

Motion to Amend Appellants' Petition for Rehearing

COME NOW, Teresa Ballard, Kenisha Bryant, and Cheryl King, Appellants herein, by the through their attorneys of record, **THE NIXON LAW FIRM**, and in support of their motion would show the Court as follows:

That currently pending before this Court is Appellants' Petition for Rehearing of this Court's opinion in *Luebbers v. Advance America Cash Advance Centers of Arkansas, Inc.* 2002 WL 937685 (Ark. 2002) (Appeal No. 01-1182).

That this Court dismissed Appellants' appeal because Appellants' motion to intervene had been denied by the trial court, had not yet been reversed by this Court, and consequently, "appellants do not have standing to appeal this issue because they are not parties who may take independent action in the underlying class action." *Id.*

That this Court in its opinion in the case of *Haberman v. Lisle*, 318 Ark. 177, 884 S.W. 2d 262 (1994) relied on *Croyden*

Assoc. v. Alleco, Inc., 969 F.2d 675 (8th Cir. 1992) for the premise that unnamed class members lack standing to appeal a decision approved by the class representatives.

That on June 10, 2002, the United States Supreme Court issued its opinion in *Devlin v. Scardelletti, et al.*, 536 U.S. _____(2002)[1] and determined that unnamed class members who have objected in a timely manner to approval of a class action settlement at the fairness hearing have the power to bring an appeal without first intervening, abrograting the "lack of standing" issue advanced by *Croyden* and *Haberman*. The U.S. Supreme Court's opinion is submitted contemporaneously with this motion.

That Appellants meet the test set forth in *Devlin v. Scardelletti, et al., id.* permitting them to appeal an adverse determination in the trial court.

That Appellants respectfully request leave to supplement their prior filing in this proceeding to bring to the attention of this Honorable Court this recent decision by the United States Supreme Court, which has a direct bearing upon the issues pending in this matter.

WHEREFORE, premises considered, the Petitioners Teresa Ballard, Kenisha Bryant, and Cheryl King respectfully request this Court to allow them to amend their Petition for Rehearing in SC 01-1182 in order to bring to the Court's attention the United States Supreme Court decision of *Devlin v. Scardelletti, et al.*, 536 U. S. ____(2002) which has a direct bearing on the issues before this Court and to grant them other and further relief to which they may be entitled.

---

[1] 2002 WL 1270617

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Certificate of Service

I, David G. Nixon, do hereby certify that on the 11th day of June 2002 I caused a true and correct photo copy of the within and foregoing document, with exhibits, if any to be served on those persons shown below via U.S. First class Mail, to wit:

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IN THE SUPREME COURT OF ARKANSAS

[Filed June 12, 2002]

TERESA BALLARD;
KENISHA BRYANT;
CHERYL KING; and
CRYSTAL LUEBBERS APPELLANTS

No. 01-1182

PHYLLIS GARRETT,
individually, and o/b/o
a class of similarly situated persons; and
ADVANCE AMERICA, CASH ADVANCE
CENTERS OF ARKANSAS, INC., APPELLEES

Brief in Support of Motion to Amend Appellants' Petition for Rehearing

COME NOW, Teresa Ballard, Kenisha Bryant, and Cheryl King, Appellants herein, and submit this Brief in support of their motion filed contemporaneously herewith:

1. Appellants are Parties for the Purposes of Appealing Approval of the Settlement.

Currently pending before this Court is Appellants' Petition for Rehearing of this Court's opinion in *Luebbers v. Advance America Cash Advance Centers of Arkansas, Inc.*, 2002 WL 937685 (Ark. 2002) (Appeal 01-1182). Appellants are unnamed class members who were denied their motion to intervene in the trial court and who had filed their notice of objections to the proposed settlement on July 6, 2001. Despite the objections entered during the fairness hearing of July 18, 2001, the trial court approved the settlement as it had been proposed. Appellants filed notice of appeal on the issues of intervention and settlement, whereupon the trial

court ordered objectors to post a $750,000 bond while the appeals were pending, resulting in the above styled appeal.

This Court dismissed Appellants' appeal and cited *Haberman v. Lisle*, 318 Ark. 177, 884 S.W. 2d 262 (1994) for the premise that unnamed class members lack standing to appeal a decision approved by the class representatives where Appellants' motion to intervene had been denied by the trial court. *Haberman* was an extension of the precedent set by the Eighth Circuit Court of Appeals in *Croyden Assoc. v. Alleco, Inc., 969 F. 2d 675 (8th Cir. 1992).* Appellants submit that a recent decision by the United States Supreme Court has abrogated the premise upon which *Croyden* and *Haberman* stand and amend their Petition for Rehearing to include the *Devlin, infra,* opinion.

In *Devlin v. Scardelletti, et al.*, 2002 WL 1270617, 536 U.S. ___ (June 10, 2002), the United States Supreme Court directly addressed the issue of whether a unnamed class member, whose motion to intervene was denied at the trial court, has the power to bring an appeal without first intervening. The Court found that, contrary to the position held by some circuits and embraced by *Croyden* and *Haberman*, the issue was not one of standing because appellant had not been successful in intervening, but rather whether the Appellant was a party for the purposes of appealing the settlement approval. The Devlin Court held that an unnamed class member who had timely objected to approval of a settlement at a fairness hearing has the power to bring an appeal without first intervening, abrogating the precedent of *Croyden* and *Haberman*.

Devlin is directly on point to the situation faced by Appellants. Appellants moved to intervene and were denied by the trial court. They filed timely objections and raised those objections at the fairness hearing. Therefore, Appellants have the power to bring an appeal without first

intervening. This Court should reconsider its reliance on *Haberman* and *Croyden* in light of the *Devlin* decision.

2. Conclusion

For all of the above reasons, Appellants request that they be allowed to amend their Petition for Rehearing to include the recent decision of the United States Supreme Court which has direct bearing upon the issues pending in this matter, and that this Court reconsider and set aside its May 9, 2002 Order dismissing this appeal, reinstate the same, and grant them such other and further relief to which they may be entitled.

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Certificate of Service

I, David G. Nixon, do hereby certify that on the 11th day of June 2002 I caused a true and correct photocopy of the within and foregoing document, with exhibits, if any, to be served on those persons shown below via U.S. First class Mail, to wit:

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Supreme Court, U.S.
FILED
NOV 18 2002

No. 02-426

IN THE

Supreme Court of the United States

TERESA BALLARD, KENISHA BRYANT
and CHERYL KING,

Petitioners,

v.

PHYLLIS GARRETT and ADVANCE AMERICA,
CASH ADVANCE CENTERS OF ARKANSAS, INC.,

Respondents.

**ON PETITION FOR A WRIT OF CERTIORARI
TO THE ARKANSAS SUPREME COURT**

BRIEF IN OPPOSITION FOR RESPONDENT ADVANCE AMERICA, CASH ADVANCE CENTERS OF ARKANSAS, INC.

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STATEMENT PURSUANT TO RULE 29.6

Respondent, Advance America, Cash Advance Centers of Arkansas, Inc., is wholly owned by Advance America, Cash Advance Centers, Inc.

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Appendix B — Joint Motion To Vacate Order Requiring Objectors To Post Supersedeas Bond Of The Circuit Court Of Clark County, Arkansas Dated And Filed November 12, 2002 ..... 3a

Advance America, Cash Advance Centers of Arkansas, Inc. ("Advance America") submits this Opposition to the Petition for Writ of Certiorari filed by Petitioners Teresa Ballard, Kenisha Bryant and Cheryl King ("the Petition"). Petitioners ask this Court to review the judgment of the Arkansas Supreme Court dismissing their appeal from a trial court order requiring that they post a supersedeas bond. For the following reasons, the Petition should be denied.

STATEMENT OF FACTS

The underlying class action was filed on October 12, 1999. After eighteen months of contentious litigation, and two interlocutory appeals to the Arkansas Supreme Court, the parties were able to negotiate a proposed settlement. The trial court approved the proposed settlement on July 18, 2001, over the objections of the three Petitioners.[1] Thereafter, the Petitioners appealed to the Arkansas Supreme Court from the trial court's approval of the settlement and from the trial court's order denying their motion to intervene.

After Petitioners noted their appeals to the Arkansas Supreme Court, the class representative, Phyllis Garrett, moved the trial court for an order requiring the Petitioners to post a supersedeas bond to protect the interests of the class

1. Court-approved notice of the proposed settlement was mailed to over 19,200 potential class members. Four class members opted out of the settlement. Four other class members, three of whom are the Petitioners herein, chose not to opt of the settlement and moved to intervene for purposes of objecting to the proposed settlement. Their motion to intervene was denied by the trial court as untimely, but they were nonetheless permitted to appear at the fairness hearing, where they stated their objections and argued by counsel against approval of the settlement.

while the Petitioners appealed the settlement approval. On September 5, 2001, the trial court granted Garrett's motion and ordered Petitioners to post a $750,000 supersedeas bond, which was the amount of the cash component of the settlement as approved by the trial court. On September 20, 2001, Petitioners noted a third appeal to the Arkansas Supreme Court from the order requiring them to post a bond.

Petitioners never posted the bond as ordered. So, on November 2, 2001, Garrett filed a motion in the trial court seeking to hold Petitioners in contempt of court for refusing to post the bond. On November 9, 2001, Petitioners petitioned the Arkansas Supreme Court for a writ of prohibition or certiorari prohibiting the trial court from requiring them to post the bond. The Arkansas Supreme Court denied that petition, and held that the trial court did have jurisdiction to order the posting of the supersedeas bond to protect the interests of the class. *See Ballard v. Clark County Circuit Court*, 347 Ark. 291, 294, 61 S.W.3d 178, 180 (2001).

On May 9, 2002, the Arkansas Supreme Court dismissed Petitioners' appeal of the order requiring them to post a bond. *See Luebbers v. Advance America, Cash Advance Centers of Arkansas, Inc.*, 348 Ark. 567, 573, 74 S.W.3d 608, 611 (2002).

On May 29, 2002, Petitioners filed a petition for rehearing with the Arkansas Supreme Court, raising for the first time due process and equal protection challenges. On June 12, 2002, the Petitioners filed a motion to amend their petition for rehearing, citing for the first time this Court's decision in *Devlin v. Scardelletti*, 536 U.S. __, 122 S. Ct. 2005 (2002). The petition for rehearing and the motion to amend were both denied by the Arkansas Supreme Court.

The Arkansas Supreme Court issued its mandate on this appeal on June 13, 2002. However, the Petitioners moved for a recall and stay of the mandate for ninety days to allow them to petition this Court for a writ of certiorari. The Arkansas Supreme Court granted the motion, the mandate was recalled, and its re-issuance was stayed for ninety days. During the stay of the mandate, the Petitioners filed their Petition for Writ of Certiorari with this Court.

On October 2, 2002, the trial court ruled on Garrett's contempt motion that had been filed on November 2, 2001. The trial court declined to hold Petitioners in contempt for refusing to post the bond. (App. A).

On October 4, 2002, the Petitioners moved in the Arkansas Supreme Court for a continuance of the stay of the mandate on the bond appeal, which Advance America opposed. On October 31, 2002, the Arkansas Supreme Court denied Petitioners' motion to continue the stay of the mandate on the bond appeal. The Arkansas Supreme Court then issued its mandate to the clerk of the Circuit Court of Clark County, Arkansas, returning jurisdiction to the trial court.

On November 12, 2002, Garrett and Advance America jointly moved the trial court to vacate the bond order because no bond has been or will be posted; and because vacating the order would benefit the class by bringing finality to the litigation and permitting execution of the court-approved settlement to move forward. (App. B). The trial court granted the motion to vacate and vacated its bond order on November 18, 2002.

REASONS FOR DENYING THE PETITION

The issue raised by the Petitioners is now moot. The Petitioners have never complied with the order to post a supersedeas bond. Since the filing of the Petition, the trial court has declined to hold Petitioners in contempt for failing to post the bond, so the threat of contempt is no longer present. (App. A). All three of the Petitioners' state court appeals have now been dismissed, making the bond no longer necessary to protect the interests of the class. Therefore, the parties to the underlying class action jointly moved the trial court to vacate its bond order, which the trial court did on November 18, 2002. (App. B). Ironically, this appeal over a bond that was initially intended to protect the class, is now the only thing preventing the class members from receiving the settlement benefits to which they are entitled. The Petitioners, who have tried to derail the settlement at every opportunity, are further delaying it by attempting yet another appeal to this Court related to an order that they have not complied with, and will never have to comply with now that the threat of contempt has been removed and the order vacated.

Second, there is no compelling reason to grant the Petition because the judgment of the Arkansas Supreme Court does not conflict with this Court's holding in *Devlin v. Scardelletti*, 536 U.S. __, 122 S. Ct. 2005 (2002). The Petitioners did not raise *Devlin* or any federal constitutional issues in the Arkansas Supreme Court until *after* their appeal had been dismissed. Even then, their reliance on *Devlin* was and still is completely misplaced. *Devlin* holds that for the limited purpose of appealing from a district court's approval of a federal class action settlement, intervention by an otherwise timely objector to the settlement is not required. *Devlin* does not hold, as Petitioners argue, that timely objectors to state class action settlements are

"parties" or may stand in the shoes of "parties" for all purposes and on all issues. Additionally, *Devlin* did not involve the issue presented here, which is whether intervention at the trial court level is required for objectors to appeal from a trial court order entered under Arkansas Rule of Appellate Procedure 8 requiring them to post a supersedeas bond.

I.

THE ISSUE PRESENTED BY THE PETITION IS MOOT.

This Court is not in the business of entertaining cases in which the issue has become moot. *See Sears, Roebuck and Co. v. Carpet, Linoleum, Soft Tile and Resilient Floor Covering Layers, Local Union, et al.*, 397 U.S. 655, 657, 90 S. Ct. 1299, 1300 (1970) ("To adjudicate a cause which no longer exists is a proceeding which this court uniformly has declined to entertain."); *see also Hall v. Beals*, 396 U.S. 45, 90 S. Ct. 200 (1969); *Golden v. Zwicker*, 394 U.S. 103, 89 S. Ct. 956 (1969). Petitioners ask the Court to abandon this well settled practice.

On September 5, 2001, the trial court ordered Petitioners to post a supersedeas bond to protect the interests of the class while the execution of the settlement was stayed pending the outcome of Petitioners' multiple appeals. The Petitioners refused to post the bond, and proceeded with three separate appeals to the Arkansas Supreme Court anyway. All three of Petitioners appeals have now been dismissed for reasons having nothing to do with their failure to post a bond, leaving the parties poised to proceed with execution and administration of the settlement.

Also, the trial court that entered the bond order recently declined to hold the Petitioners in contempt for refusing to post the bond. (App. A). The parties to the class action settlement have also recently filed a joint motion with the trial court to vacate the bond order altogether, given that no bond has ever been posted, none will ever be posted, and the need for one no longer exists. (App. B). The trial court granted the motion to vacate and vacated the bond order on November 18, 2002. Even though Petitioners never posted the bond, and even though the Arkansas Supreme Court held that the trial court had jurisdiction to order posting of the bond, the Petitioners were still permitted to appeal the settlement approval and the denial of their intervention motion to the Arkansas Supreme Court. The trial court's order requiring a bond had no adverse effect whatsoever on Petitioners' ability to pursue their appeals to the Arkansas Supreme Court. The Petitioners have not suffered and will not suffer any deprivation of a liberty or property interest by reason of their defiance of that order, or by the Arkansas Supreme Court's dismissal of their appeal from that order. In short, the Petitioners are attempting to appeal from a judgment that let stand an order they have not complied with, are no longer required to comply with, and from which they have not been aggrieved. Under these circumstances, granting the Petition would be a waste of judicial resources and would abandon the long-standing practice of this Court to refrain from deciding issues that are moot.

II.

THE DECISION OF THE ARKANSAS SUPREME COURT DOES NOT CONFLICT WITH THIS COURT'S OPINION IN *DEVLIN.*

The Arkansas Supreme Court dismissed Petitioners' appeal of the bond order on May 9, 2002. *Devlin* was decided on June 10, 2002. Prior to the dismissal of their appeal, the Petitioners never raised in the trial court or the Arkansas Supreme Court any federal constitutional questions, and they certainly did not argue the *Devlin* decision because it did not then exist.

As Petitioners acknowledge, they first raised their constitutional concerns in a petition for rehearing filed in the Arkansas Supreme Court after dismissal of their appeal, and first raised *Devlin* in a motion to amend their petition for rehearing filed over a month after their appeal had already been dismissed.

The late assertion of these arguments notwithstanding, *Devlin* clearly has no application to the issue presented by the Petition, and the decision of the Arkansas Supreme Court dismissing Petitioners' appeal of the bond order does not conflict with *Devlin.*

In *Devlin*, this Court was faced with the question of whether an objector, who did not have the ability to opt out of a federal class action settlement, must first intervene in order to appeal the district court's approval of the settlement over his timely objections. The Court held that unnamed class members, who have timely objected to approval of a federal class action settlement, may appeal the settlement approval

without first intervening. *See Devlin*, 536 U.S. at __, 122 S. Ct. at 2013. *Devlin* does not hold, as Petitioners argue, that timely objectors to state class action settlements are "parties" or may stand in the shoes of "parties" for all purposes and on all issues.

As the Arkansas Supreme Court correctly recognized, *Devlin* also involved facts and issues that are distinguishable from those presented in this case and by the Petition. *Devlin* involved an appeal from a district court's approval of a class action settlement under the Federal Rules of Civil Procedure. By contrast, this case involves an appeal from an order entered under Arkansas Rule of Appellate Procedure 8 requiring the objectors to post a supersedeas bond to protect the interests of the class while they appealed the approval of a state class action settlement. Thus, the Petition before this Court raises questions of Arkansas state law and procedure in Arkansas state courts.

Another distinguishing factor is that a significant concern for the majority in *Devlin* was the right of unnamed class members, who had timely objected to a settlement, to protect their own interests in a settlement by which they would be bound. *See Devlin*, 536 U.S. at __, 122 S. Ct. at 2011. This was a particular concern in *Devlin* because the federal class action there had been certified under Rule 23(b)(1) of the Federal Rules of Civil Procedure, so the objecting class member did not have the ability to opt out of the settlement. *See id.* Because he was not able to opt out of the class, appealing the approval of the settlement was the only means by which the objector could protect himself from being bound by a settlement to which he objected. *See id.*

Unlike the objecting class member in *Devlin*, the Petitioners here had the ability to opt out of the settlement and avoid being bound by it. Indeed, the Petitioners were ideally positioned to opt of the settlement because they already had their own action pending against Advance America for the same relief (and then some) as sought by the class representative in this litigation.[2] By attempting to intervene at the last minute, rather than opt out of a settlement to which they objected, Petitioners willingly undertook the risk that their motion to intervene might be denied for failure to meet the requirements of Rule 24(a) of the Arkansas Rules of Civil Procedure, and that they would then be bound by the settlement as approved by the trial court. Petitioners' strategic election not to opt out of the settlement, plus their failure to meet the requirements of Arkansas Rule of Civil Procedure 24(a), further distinguishes this matter from *Devlin*.

---

2. At the time they moved to intervene, the Petitioners were named plaintiffs in another putative class action against Advance America. *See Ballard, et al. v. AA Check Cashiers, et al.*, No. CIV-00-5100 (W.D. Ark. 2000). That case was dismissed by the district court in November 2000 for failure to state a claim and for lack of subject matter jurisdiction. Petitioners were appealing that dismissal to the U.S. Court of Appeals for the Eighth Circuit at the time they sought to intervene in this matter. The Eighth Circuit Court of Appeals later affirmed the dismissal by the district court. *See Ballard, et al. v. AA Check Cashiers, et al.*, 2001 WL 1117558 (8th Cir. 2001).

CONCLUSION

For all of the foregoing reasons, Advance America respectfully requests that this Honorable Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX A — ORDER OF THE CIRCUIT COURT OF CLARK COUNTY, ARKANSAS DENYING PLAINTIFF'S MOTION FOR CONTEMPT DATED OCTOBER 2, 2002

IN THE CIRCUIT COURT OF CLARK COUNTY, ARKANSAS

CIV-99-152

PHYLLIS GARRETT, *individually and o/b/o a class of other similarly situated persons*

PLAINTIFFS

VS.

ADVANCE AMERICA CASH ADVANCE CENTERS OF ARKANSAS, INC.

DEFENDANT

ORDER

Comes on now for hearing, the above-styled matter, and the Court being well and sufficiently advised and having considered the arguments, briefs and affidavits filed by the parties does hereby find as follows:

The objectors have never personally appeared at any hearings or proceedings before this Court. Pending before the Court is the Plaintiff's motion to hold the objectors in contempt of this Court's September 5, 2002 Order.

Appendix A

The objectors' appeals have been dismissed by the Arkansas Supreme Court and this Court's orders have been affirmed. Based on the pleadings, arguments and evidence before the Court, the Plaintiff's motion for contempt is hereby denied.

IT IS SO ORDERED.

s/ John A. Thomas
HON. JOHN A. THOMAS

10/2/02
DATE

APPENDIX B — JOINT MOTION TO VACATE ORDER REQUIRING OBJECTORS TO POST SUPERSEDEAS BOND DATED AND FILED NOVEMBER 12, 2002

IN THE CIRCUIT COURT OF CLARK COUNTY, ARKANSAS

CIV-99-152

PHYLLIS GARRETT, individually and o/b/o a class of similarly situated persons

PLAINTIFF

vs.

ADVANCE AMERICA, CASH ADVANCE CENTERS OF ARKANSAS, INC.

DEFENDANT

JOINT MOTION TO VACATE ORDER REQUIRING OBJECTORS TO POST SUPERSEDEAS BOND

Plaintiff, Phyllis Garrett, and defendant, Advance America, Cash Advance Centers of Arkansas, Inc. ("Advance America"), jointly move the Court to vacate its order of September 5, 2001, requiring Teresa Ballard, Kenisha Bryant and Cheryl King ("the Objectors"), to post a supersedeas bond in the amount of $750,000.

Appendix B

I. INTRODUCTION

This Court approved the class action settlement in this action on July 18, 2001, over the objections of the Objectors. Thereafter, the Objectors appealed to the Arkansas Supreme Court from this Court's approval of the settlement and from this Court's denial of their motion to intervene.[1]

After the Objectors noted their appeals, plaintiff, Phyllis Garrett moved this Court for an order requiring the Objectors to post a supersedeas bond to protect the interests of the class while the Objectors' appealed the settlement approval. On September 5, 2001, this Court entered an order requiring the Objectors to post a supersedeas bond in the amount of $750,000. On November 9, 2001 the Objectors petitioned the Arkansas Supreme Court for a writ of prohibition or certiorari prohibiting this Court from requiring them to post the bond. On December 13, 2001, the Arkansas Supreme Court denied the Objectors' petition for a writ of prohibition or certiorari, and held that this Court had jurisdiction to order the posting of the supersedeas bond. *See Ballard v. Clark County Circuit Court*, 347 Ark. 291, 294, 61 S.W.3d 178, 180 (2001). Despite this ruling of the Arkansas Supreme Court, the Objectors steadfastly refused to post the bond, so Garrett filed a motion in this Court on November 2, 2001, seeking to hold the Objectors in contempt of court for refusing

1. The Objectors' appeal challenging the settlement approval was dismissed for lack of standing. *See Ballard v. Advance America, Cash Advance Centers of Arkansas, Inc.*, 349 Ark. 545, 79 S.W.3d 835 (July 5, 2002). The Arkansas Supreme Court affirmed this Court's denial of the Objector's motion to intervene. *See Ballard v. Garrett*, 349 Ark. 371, 78 S.W.3d 73 (Jun. 20, 2002).

to post the bond as ordered. This Court held a hearing on the contempt motion on January 14, 2002, and entered an order on October 2, 2002, declining to hold the Objectors in contempt.

On September 20, 2001, the Objectors appealed to the Arkansas Supreme Court from this Court's September 5, 2001 order requiring them to post a bond ("the bond appeal"). The Arkansas Supreme Court dismissed the bond appeal on May 9, 2002 for lack of standing. *See Luebbers v. Advance America, Cash Advance Centers of Arkansas, Inc.*, 348 Ark. 567, 74 S.W.3d 608 (2002). The Arkansas Supreme Court issued its mandate on the bond appeal on June 13, 2002; however, the Objectors moved in the Arkansas Supreme Court for a recall and stay of the mandate for ninety (90) days to allow them to pursue an appeal in the United States Supreme Court. The Arkansas Supreme Court granted the motion, the mandate was recalled, and its re-issuance was stayed for 90 days. The Objectors then filed a petition for writ of certiorari in the United States Supreme Court. That petition has not yet been ruled upon, and Advance America's opposition to the petition is due November 18, 2002 in the U.S. Supreme Court.

On October 4, 2002, the Objectors moved in the Arkansas Supreme Court for a continuance of the stay of the mandate on the bond appeal, which Advance America opposed. On October 31, 2002, the Arkansas Supreme Court denied the Objectors' motion to further continue the recall of the mandate on the bond appeal. The mandate on the bond appeal was issued to the Clerk of this Court on October 31, 2002, restoring jurisdiction of this matter to this Court.

Appendix B

II. ARGUMENT

A. *This Court Has Jurisdiction To Vacate Its September 5, 2001 Order.*

The filing of the mandate by the Arkansas Supreme Court with the Clerk of this Court restored jurisdiction to this Court. While there is a petition for writ of certiorari pending in the United States Supreme Court, the exercise of jurisdiction by the U.S. Supreme Court is entirely discretionary and depends on the granting of the writ of certiorari. *See Hammerstein v. Superior Court of California, et al.*, 341 U.S. 491, 492 (The exercise of U.S. Supreme Court jurisdiction is determined by issuance of a writ of certiorari, which is discretionary.); see also SUP. CT. R. 10 (Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons). No writ of certiorari has been granted here. The U.S. Supreme Court has not exercised jurisdiction over this matter, and may never do so. Nor has the Supreme Court taken any action that would prevent this Court's exercising its jurisdiction to vacate its own order.

In Arkansas, a trial court has jurisdiction to set aside or modify an order or judgment after the mandate of an appellate court has been returned. *See Davis v. Davis*, 291 Ark. 473, 477, 725 S.W.2d, 845, 847 (1987). The trial court may modify, vacate or set aside its judgment even though the judgment has been affirmed on appeal. *See Garrett v. Allstate Ins. Co.*, 26 Ark. App. 199, 201, 762 S.W.2d 3, 5 (1988). Also, the prohibition of a supersedeas is removed by dismissal of the appeal that gave rise to the supersedeas. *See Searcy Steel*

Appendix B

Co. v. Mercantile Bank of Johnsboro, 19 Ark. App. 220, 226, 799 S.W.2d 277, 281 (1986). Because all of the Objectors' appeals have been dismissed by the Arkansas Supreme Court, and the mandate on the bond appeal has been returned to the Clerk of this Court, this Court has jurisdiction to vacate the September 5, 2001 bond order as requested.

B. *The Court Should Vacate Its September 5, 2001 Order Requiring The Objectors To Post Bond.*

The purpose of this Court's order requiring Objectors to post a bond was to protect the interests of the class by insuring that the cash component of the settlement would still be available if and when the Objectors' appeals failed. All three of the Objectors' appeals to the Arkansas Supreme Court have now been dismissed, leaving the parties poised to proceed with execution and administration of the settlement. However, the execution and administration of the settlement cannot go forward because the Objectors are attempting yet another last ditch appeal to the U.S. Supreme Court from an order of this Court that they have never obeyed and have no intention of ever obeying. Because this Court recently declined to hold the Objectors in contempt for not posting the bond, the Objectors can continue to defy this Court's order with Impunity and without consequences to themselves. The Objectors are now using their continued defiance of this Court's order as an affirmative tactic to manufacture another appeal and further delay execution of the settlement to the detriment of the other 19,000 class members who have already waited more than a year to receive their settlement benefits. The class has waited long enough, and the games being played by the Objectors need to stop.

Appendix B

This Court had the best interests of the class in mind when it ordered the Objectors to post a bond. However, the best interests of the class have now changed, in light of the fact that the Arkansas Supreme Court has dismissed all of the Objectors' appeals, clearing the way for the settlement to go forward. The supersedeas bond is no longer necessary because the appeal that gave rise to it has now been dismissed, and the parties are ready, willing and able to proceed with execution and administration of the settlement as approved. It is unfair to the other 19,000 class members to permit the three Objectors to hold the settlement hostage by continuing to litigate over an order that they have never complied with, and no longer have to comply with now that the threat of contempt has been removed. It is now in the best interests of the class to allow the settlement to go forward. The time has come to bring finality to this litigation. Accordingly, the parties jointly move the court to vacate its September 5, 2001 order requiring the objectors to post a supersedeas bond.

Respectfully submitted,

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Appendix B

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(A)

Supreme Court U.S.
FILED
DEC 2 2002
OFFICE OF THE CLERK

No. 02-426

IN THE
Supreme Court of the United States

TERESA BALLARD, ET AL.,
Petitioners,

v.

PHYLLIS GARRETT AND ADVANCE AMERICA,
CASH ADVANCE CENTERS OF ARKANSAS, INC.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARKANSAS

REPLY BRIEF OF PETITIONERS

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Appendix A 1a

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STATEMENT OF THE CASE

Despite Respondent Advance America's repeated assertions to the contrary, the Petitioners never "refused" to post the $ 750,000.00 bond ordered by the trial court (Opp. Brf., pp. 2, 5, 6and never "defied" that order (Opp. Brf., p. 6), both of which labels connote intentional acts of disobedience by the Petitioners.[1] As the record below clearly shows, the Petitioners - former payday lending customers of Advance America -- were *unable* to raise the $ 750,000.00 to $ 825,000.00 in cash and property required to comply with the order.

Advance America then proceeds to inform this Court that the issue is moot because the underlying trial court order requiring the bond was set aside on November 18, 2002 - the date their Opposition Brief was filed here. That statement is simply and patently untrue. As of the date this Reply Brief is being written, no trial court order to that effect has been found of record by the Petitioners after repeated inquiry, although an order is apparently being circulated. Moreover, if such an order existed, why was it not included in Advance America's Appendix? More will be said on this subject below.

The Petitioners were unaware of the trial court's October 2, 2002 order denying Garrett's Motion for Contempt until they received the Respondents' November 12, 2002 Joint Motion to Vacate Order Requiring Objectors to Post Supersedeas Bond by telecopier. On Friday, November 15 - while Petitioners' counsel was out of town - a notice arrived from the trial court for a telephonic hearing on the Joint Motion to be conducted at 9:00 a.m. on Monday, November 18. Petitioners prepared a written response to the Joint Motion and transmitted it by Telecopier to the trial court at

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[1] It should also be remembered that this so-called "supersedeas" bond was ordered in the absence any supersedeas order whatsoever.

approximately 8:30 a.m. the morning of November 18. **(Supp. App. 1a.)** Petitioners did not appear by telephone for the hearing because counsel mistakenly believed the trial court was initiating the call and, when counsel discovered otherwise and called the trial court, the hearing was concluded. As stated above, Petitioners have made repeated inquiries of the trial court, its staff, the trial court clerk's office and counsel for Advance America for a copy of any order resulting from that hearing and have been made aware of no such order being signed or entered by the trial court.

REASONS FOR GRANTING THE PETITION

The weakness of the Respondents' argument is evident from the form of their response... Garrett has waived her right to respond and Advance America has ignored the equal protection violation sharply focused before us by the Arkansas Supreme Court's denial of standing. Instead – as has been typical in these proceedings – procedural manipulation is being substituted for merit: If the Respondents can't win on the merits, they will blatantly attempt to deprive this Court of jurisdiction to hear the matter, *even* if they have to bend the facts and law a little to get it done.

The timeline of their attempt to moot this issue is evident as is their misrepresentation of fact concerning the trial court's order. Their presumption in being able to secure the order they sought through their Joint Motion to Vacate should also be noted, however: If their Opposition Brief was due to be filed on November 18 (the same day for which they obtained a hearing on their Joint Motion), their Brief *must* have gone to the printer containing the presumed fact that the requested order was obtained and entered.

The "fly in the ointment," however, was that the relief they sought from the trial court – once again – was clearly beyond what the trial court had authority to grant. The

Petitioners in their Response to the Joint Motion demonstrated this. Where in the past, they were able to obtain a supersedeas bond in the absence of a supersedeas order, or obtain approval of a settlement agreement without putting on any real evidence to show its fairness (other than some financial information submitted under seal and not subject to cross-examination), this time the trial court apparently thought better of it.

I. The Decision of the Arkansas Supreme Court Conflicts with Recent Precedent of this Court.

Advance America implies that Petitioners were untimely in raising the constitutional issues of standing and equal protection below. (Opp. Brf., pp. 4, 7.) It must be remembered that those issues were not presented until the Arkansas Supreme Court *dismissed* their appeal and denied the Petitioners an opportunity to be heard. They then timely raised those issues in their Petition for Rehearing to the Arkansas Supreme Court, which rejected those arguments.

Advance America also incorrectly suggests that this Court's decision in *Devlin v. Scardelletti*, 536 U.S. ---, 122 S.Ct. 2005, 153 L.Ed.2d 27 (2002), does not apply because we are dealing here with the question of appellate standing arising under ARK. R. APP. P. 8. (Opp. Brf., p. 5.) The Arkansas Supreme Court, however, distinguished *Devlin* because it dealt with FED. R. CIV. P. 23, while the instant case dealt with ARK. R. CIV. P. 23. (**App. A, pp. 12a-13a.**)

Advance America then attempts to justify the Arkansas Supreme Court's rejection of *Devlin* on the grounds that the appellant in *Devlin* did not have the ability to opt out of the settlement. Advance America implies that the Petitioners deserve to be denied their right of appeal below because they "attempt[ed] to intervene at the last minute, rather than

opt out of a settlement to which they objected."[2] (Opp. Brf., p. 9.) In the first place, this Court only committed *one sentence* in *Devlin* to the fact that the appellant did not have the ability to opt out of the settlement class. All of the remainder of the *Devlin* opinion went to the fundamental constitutional policies requiring that absent class members be given a right to be heard if they timely preserve their objections. This Court has never stated that non-intervening class members' only real option is to "take it or leave it." Indeed, such a position would be manifestly contrary to the history of class action practice, which was designed to permit persons with small individual claims to join together and seek an economically viable remedy. To prohibit them from appealing an unfair and inadequate class settlement if they have the right to opt out and pursue their small individual claim leaves them with no real remedy at all. Those who step forward and appeal are – in effect – doing so as representatives for the remainder of the class who will all benefit if the appeal is successful. This analysis is also consistent with this Court's reversal of the U. S. Court of Appeals for the Eighth Circuit's decision to dismiss an appeal for lack of standing[3] pursuant to *Devlin* that concerned an opt-out class.[4]

II. The Appellate Rule of the Arkansas Supreme Court Denies Equal Protection to the Petitioners and to All Other Similarly Situated Litigants.

Advance America completely ignores this aspect of the Petition for Certiorari. Perhaps it did so (and opted for attempting to moot the Petition, instead) because the Petitioners' position is so manifestly correct. Even if *Devlin*

---

[2] Petitioners moved to intervene as soon as the trial court certified the class and notice of certification and settlement was given.

[3] In re General American Life Ins. Co. Sales Practices Litigation, 268 F.3d 627 (8th Cir.(Mo.) 2001)

[4] Henderson v. General American Life Ins. Co., 122 S.Ct. 2584 (Mem), 153 L.Ed.2d 773 (Jun 17, 2002).

did not apply to this situation, the fact that other parties in Arkansas are allowed to appeal similar orders while the Petitioners (and all who follow them) are not establishes a regime for the arbitrary denial of equal protection now and in the future, *especially* since the Arkansas Supreme Court published its opinion and intends for trial courts and litigants to rely on it hereafter.

III. This Issue is not Moot.

Not only is there no evidence that the trial court has set aside its original order requiring the bond (which would be objectionable in itself under Arkansas law), the precedent created by the Arkansas Supreme Court will continue to bind future litigants and trial courts.

Moreover, dismissal of this Petition would not necessarily leave Advance America and Garrett free to perform the settlement agreement since - as alluded to in the Petition herein (p. 7, fn. 2) - the Petitioners intend to bring that issue before this Court via a Petition for Certiorari.[5] The fact that Advance America and Garrett have voluntarily attempted to deprive this Court of jurisdiction by improperly (and only allegedly) vacating the initial order does not necessarily render the issue moot where it is capable of repetition. *See, e.g., Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 191-92, 120 S.Ct. 693, 709-10, 145 L.Ed.2d 610 (2000); *City News & Novelty, Inc. v. City of Waukesha*, 531 U.S. 278, 283-84, 121 S.Ct. 743, 746-47, 148 L.Ed.2d 757 (2001).

[5] This Petition, the anticipated Petition on the denial of their right to appeal from approval of the settlement agreement, and the Petition in *Ballard v. Martin*, No. 02-542, all deal with the recent adoption in Arkansas of procedural rules dealing with class action settlements.

IV. The Question Presented is Important.

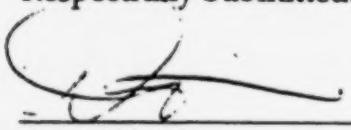
This issue presented is fundamental and important: Will class members who object and are ordered to post bonds on pain of contempt be allowed appellate review in Arkansas Courts? Do they have standing to do so? Are they denied equal protection and due process if appeal is denied them?

The Petitioners believe this questions - while fundamental - are essential to the developing law of class action practice in Arkansas and that it is important to "get it right" from the outset. This Court, with only a light hand on the tiller, can significantly influence the rights of absent class members here.

CONCLUSION

The Petitioners respectfully request this Court to enter its order reversing and remanding these proceedings to the Arkansas Supreme Court for proceedings in conformity with this Court's ruling.

Respectfully Submitted:



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PETITIONERS' SUPPLEMENTAL APPENDIX

Appendix A

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November 28, 2002

Via Facsimile Only: (870) 246-9378

Honorable John A. Thomas
CLARK COUNTY CIRCUIT COURT
P.O. Box 966
Arkadelphia, Arkansas 71923-0966

Re: *Garrett v. Advance America, Cash Advance Centers of Arkansas, Inc., CIV 99-152 (Clark County, Ark. Circuit)*

Dear Judge Thomas:

We write with respect to the Joint Motion to Vacate Order currently set for telephonic hearing this morning at 9:00 a.m. Thank you for allowing us to appear by telephone. We received this Motion by telecopier the morning of November 12 and were out of the office Friday for CLE when your call came in setting today's hearing. We did not have time to formally respond and ask the Court's indulgence in doing so through this letter. We were also not sent a copy of the Court's October 2 Order, but did acquire a copy of it after receiving this Motion. We also want to make sure a record is being made of today's hearing.

1. The Background

This is not the first time the Movants have asked you to do something not permitted by Arkansas law. For example, they tried to have this Court dismiss this the [sic] Objectors' appeal while it was pending in the Arkansas Supreme Court. They also tried to have this Court hold the Objectors in contempt while jurisdiction was still in the Arkansas Supreme Court. As we suggest below, you are now being asked to perform an act outside of your authority.

This matter is currently the subject of a Petition for Certiorari pending in the U. S. Supreme Court. In addition, the Objectors fully intend and are in the process of filing a Petition for Certiorari with regard to the dismissal of their appeal on the settlement agreement itself.

The justifications advanced by the Movants revolve around allegations that granting their Motion is in the best interests of the class in order to set aside the existing superseadas [sic]. However, as you already know, you have never entered a superseadas [sic] and the parties obligations under the settlement agreement are not ripe until all appeals are concluded. Despite allegations of willful misconduct by

the Objectors, their failure to post a $ 750,000.00 was clearly not willful (i.e., was not a "refusal" to comply)... They simply lacked the ability to do so, as anyone could see.

So why, after all their effort to subject the Objectors to contempt (i.e., to punish them for daring to contest these proceedings), do the Movants now ask you to simply set aside your original Order? What they tell you is that the purpose of the supersedeas bond was to protect the class, yet it was obvious to all that the only party able to provide such security was Advance America, who was never asked to do so. The real reason is that now that you have declined to hold the Objectors in contempt, the Movants simply don't want to go to the trouble of responding to the Objectors' Petition for Certiorari... Or perhaps they're concerned that the Objectors are right. In either event, they want you to act outside the purview of Rule 60 to attempt to deprive the U. S. Supreme Court of jurisdiction. They created this situation, but now they want to avoid its consequences when it has become. [sic]

2. The Law

The Movants' citation to Davis v. Davis, 291 Ark. 473, 725 S.W.2d 845 (1987) is disingenuous. That case involved a situation where the prevailing party had practiced a fraud upon the trial court in preparing a judgment in excess of that ordered by the trial court. Even though the judgment was upheld on appeal, the trial court set the judgment aside after the mandate issued in order to correct the fraud. The Arkansas Supreme Court approved that action *pursuant to ARK. R. CIV. P. 60(c)(4)* (grounds for setting aside judgment after 90 days). Surely the Movants do not contend that they practiced a fraud upon this Court in obtaining their own judgment!

To the contrary, ARK. R. CIV. P. 60(b) clearly controls this situation (court has plenary control over its orders for a

period of 90 days). Under that Rule, this Court is simply without jurisdiction to perform the act now requested of it. *See, e.g.,* City of Little Rock v. Ragan, 297 Ark. 525, 763 S.W.2d 87 (1989):

> To correct any error or mistake or to *prevent the miscarriage of justice* [emphasis in original], a decree or order of a circuit, chancery or probate court may be modified or set aside on motion of the court or any party, with or without notice to any party, within ninety days of its having been filed with the clerk. [Our emphasis.]
>
> We do not reach the merits of the argument because we have held frequently that the trial court loses the power to act under Rule 60(b) after ninety days from the filing of the judgment, decree or order with the clerk. Diebold and First National Bank of Wynne v. Myers General Agency, Inc., 292 Ark. 456, 731 S.W.2d 183 (1987); Mullen v. Couch, 288 Ark. 231, 703 S.W.2d 866 (1986); Burgess v. Burgess, 286 Ark. 497, 696 S.W.2d 312 (1985); McGibbony v. McGibbony, 12 Ark.App. 141, 671 S.W.2d 212 (1984); Harrison v. Bradford, 9 Ark.App. 156, 655 S.W.2d 466 (1983); Southern Farm Bur. Cas. Ins. Co. v. Robinson, 238 Ark. 159, 379 S.W.2d 8 (1964); Fitzjarrald v. Fitzjarrald, 233 Ark. 328, 344 S.W.2d 584 (1961); King & Houston v. State Bank, 9 Ark. 185 (1848). Here, while appellant's motion was filed on the 89th day and thus was timely, any power by the court to act on the motion lapsed with the expiration of the ninety days.

(Emphasis added.)

It has been more than 90 days since this Court entered its supersedeas Order. The Objectors pray the Court to overrule this Motion.

Thank you for your consideration.

Sincerely,

S/David G. Nixon .
David G. Nixon,
For the Firm

DGN/dgn

pcc: All counsel of record
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